No. 16070

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MAX ASUNCION TUGADE,

*Appellant,*

*vs.*

RICHARD C. HOY, District Director, Immigration and Naturalization Service,

*Appellee.*

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## APPELLEE'S OPENING BRIEF.

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### Jurisdiction.

Appellee, plaintiff below, brought an action in the District Court seeking judicial review of an order of deportation [R. 3-6].[1] Jurisdiction there was invoked pursuant to 28 U. S. C. 2201 (the Declaratory Judgment Act) and 5 U. S. C. 1009 (Sec. 10 of the Administrative Procedures Act).

The judgment of the District Court [R. 15] was a final decision; hence the jurisdiction of this Court, if any, would be found in 28 U. S. C. Sections 1291 and 1294(1).

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[1]"R." refers to the printed Transcript of Record.

## Statement of Case.

Appellant's recitation under the heading "Statement of Facts" in his brief is adequate for the purpose of this appeal and appellee therefore adopts it.

## Statement of Points.

Appellant has not stated whether or where the court below erred but, if and when such allegation is ever made by positive specification, appellee's position will be that the District Court correctly applied the law.

## Questions Presented.

As appellee understands it, appellant has raised the following issues of law in this appeal:

1. Were Presidential Proclamations Nos. 2695 and 2696, 60 Stat. 1352, 1353, void because of an unconstitutional delegation of legislative power by Congress in the Philippine Independence Act of 1934 (48 U. S. C. 1244)?

2. Was Section 241(a)(11) of the Immigration and Nationality Act, as amended, intended to be applied prospectively and applied retroactively insofar as appellant is concerned?

3. Did appellant have a status of nondeportability preserved by the savings clause of Section 405(a) of the Immigration and Nationality Act of 1952, which was not disturbed by Section 241(d) of that Act?

4. Was appellant not deportable because he was not an "alien" or, if in 1952 he was an alien, would Section 241(a)(11) of the Immigration Act not apply to him because he did not "enter" the United States as an alien?

## Statutes Involved.

Title 8, U. S. C., 1251(a) (Sec. 241(a) of the Immigration and Nationality Act of 1952), insofar as pertinent, reads:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . ." (66 Stat. 204; enacted June 27, 1952.)

Title 8, U. S. C. 1251(a)(11) was amended by Section 301(b), Public Law 728, 70 Stat. 575, July 18, 1956, to read as follows:

> "(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, *or a conspiracy to violate,* any law or regulation relating to the illicit possession of *or* traffic in narcotic drugs, or who has been convicted of a violation of, *or a conspiracy to violate,* any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;" (The italicized words are the words added by amendment in Public Law 728; otherwise the section reads as when it was enacted as part of 8 U. S. C. 1251(a) on June 27, 1952.)

## ARGUMENT.

### I.

### Appellant Has No Standing to Challenge the Constitutionality of Presidential Proclamations Nos. 2695 and 2696.

Appellant, in his brief, has alleged that Presidential Proclamations Nos. 2695 and 2696 (60 Stat. 1352, 1353), authorized by the Philippine Independence Act of 1934 (48 U. S. C. 1244), were ". . . unauthorized and unconstitutional exercise[s] of legislative power and void." This issue is raised for the first time on appeal. Nowhere in the record below [viz., Complaint, R. 3-6; Order for Findings of Fact, Conclusions of Law and Judgment, R. 10-11; Findings of Fact, Conclusions of Law and Judgment, R. 12-16] is there any mention that these Presidential Proclamations are or are not constitutional.

It is a fundamental tenet of constitutional law that one who challenges the constitutionality of either a statute or an executive order authorized by legislation must state with particularity the grounds for the allegation. These grounds must be raised in the lower court and not for the first time on appeal. Furthermore, if the case can be disposed of on any other grounds than a finding of unconstitutionality, the case must be thus resolved. But in any event, a statute or executive proclamation must not be held unconstitutional ". . . on the mere assertion of appellant without any argument or reason." (*Ramsey v. United States,* 245 F. 2d 295, 297 (C. A. 9, 1957).) And obviously this appeal can be disposed of on nonconstitutional grounds, *viz.,* even if this Court grants the relief requested by appellant it can do so without examining the constitutional merits of Presidential Proclamations Nos. 2695 and 2696.

## II.

## Appellant Had No Status of Nondeportability Immunizing Him From Deportation Under Section 241(a)(11) of the Immigration and Nationality Act of 1952.

Appellant argues that Section 405(a) of the Immigration and Nationality Act exempts him from deportation under Section 241(a)(11) of that Act. Like his argument that the Presidential Proclamations, *supra,* were unconstitutional, this argument is raised for the first time on appeal. Nothing in the Transcript of Record before this Court indicates that the court below made any ruling whatsoever regarding appellant's rights, if any, under Section 405(a). The record further indicates that appellant at no time sought a ruling from the court below regarding any rights or status he might have under that section. Although the point will be argued, it is done only out of an abundance of caution and not with an intent to abandon the Government's position that appellant's failure to raise the point below precludes him from raising the point now for the first time.

Not only is the assertion that appellant was nondeportable under Section 405(a) raised for the first time in this Court, it is alleged in an ambiguous and unintelligible manner. Appellant merely states that ". . . this status of nondeportability was preserved to him by the savings clause of Section 405(a) . . ." (Appellant's Br. p. 6). The precise wording or provisions of Section 405(a) that allegedly apply to appellant are not cited, contrary to Rule 18(2)(e) of this Court.

Appellant's argument or assertion that he is undeportable by virtue of the savings clause of Section 405(a) is not clarified by any explanation or citation of authorities.

However, if appellee understands appellant correctly, his argument is that, inasmuch as he did not "enter" the United States in 1925 as an alien, he cannot now be deported "on grounds for which entry as an alien is required." Appellant here apparently is relying on those cases[2] culminating in *Gonzales v. Barber,* 347 U. S. 637 (1954), holding in effect that deportation statutes expressly requiring "entry" as an alien do not apply to aliens who did not enter the United States in that status.

Before proceeding further, it seems advisable to clarify one point, namely, appellant, a Filipino permanently residing in the United States, is and has been since July 4, 1946, an alien. This Court has previously at great length explained how Filipinos permanently residing in the United States as nationals became, by virtue of the Independence Act of 1934 and the subsequent Presidential Proclamations, on July 4, 1946, aliens (*i.e.,* no longer nationals) of the United States. (*Cabebe v. Acheson,* 183 F. 2d 795 (1950).) Any question regarding the efficacy of the *Cabebe* decision was fully resolved in the case of *Rabang v. Boyd,* 353 U. S. 427, 340-341 (1957). Having lost his status as a "national" of the United States, appellant presumably could have applied, under the provisions of 8 U. S. C. 1437, to become a naturalized citizen of the United States. But having failed to do so, he is and must be considered, for the purposes of this appeal, an alien.

Turning now to what may be appellant's position that he is not deportable because he did not "enter" the United States as an alien, it is submitted that that argument has been conclusively resolved adversely to him by virtue of

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[2]Such cases in this Circuit include *Del Guercio v. Gabot,* 161 F. 2d 559 (1947); *Mangaoang v. Boyd,* 205 F. 2d 553 (1953), and *Gonzales v. Barber,* 207 F. 2d 398 (1953).

*Rabang v. Boyd,* 335 U. S. 427. That case involved deportation of a Philippine alien much in appellant's present position. There deportation was sought of Rabang in 1951 for conviction of a narcotics offense under the Immigration Act of 1931, 46 Stat. 1171, as amended, 54 Stat. 673. This Court, in 234 F. 2d 904 (in 1956), affirmed the District Court's decision that Rabang was deportable. Rabang appealed to the United States Supreme Court, arguing that the case of *Barber v. Gonzales,* 347 U. S. 637, was determinative on the question of "entry." The Supreme Court pointed out that the *Gonzales* and the *Rabang* cases differed in that, in the first case Section 19(a) of the Immigration Act of 1917 (39 Stat. 889) controlled because it specifically referred to deportable acts "committed . . . after entry," whereas in *Rabang,* the Supreme Court stated "[b]ut the 1931 Act differs from the 1917 Act because it is silent as to whether 'entry' from a foreign country is a condition of deportability. . . . It follows that the holding in *Gonzales* is not applicable." (*Rabang v. Boyd,* op. cit. at p. 431.) The Supreme Court also rejected Rabang's argument that the requirement of "entry" was implicit in the 1931 Act, at page 432. Although the instant case concerns the 1952 Act rather than the 1931 Act, the *Rabang* rationale that Congressional silence on the "entry" requirement for the deportation of an alien in appellant's position should be equally controlling. "Entry" as an alien is not a condition for the deportation of an alien convicted of possessing "narcotic drugs." (Sec. 241(a)(11).)

It appears that appellant concedes the applicability of the *Rabang* case to his situation, unless appellee misunderstands his suggestion ". . . that Section 241(d) relates to cases of deportation appearing in Section 241(a) where

entry was a factor, since it specifically refers to entry." (App. Br. p. 7.) Why appellant should make this suggestion without argument, when Section 241(d) (8 U. S. C. 1251(d)) states that "except as otherwise *specifically provided* in this section, provisions of this section shall be applicable to *all* aliens belonging to *any of the classes* enumerated in subsection (a) (*i.e.,* 241(a)) (emphasis ours)," mystifies appellee. Furthermore, appellee, after careful examination of Section 405(a), despite ignorance of the specific provision therein that appellant relies on, is unable to see that it even applies to him, much less negates the express provisions of Section 241(d).

## III.

## The July 18, 1956 Amendment (70 Stat. 576) to Section 241(a)(1) of the Immigration and Nationality Act Was Not Ex Post Facto Law.

Appellant argues (App. Br. pp. 5-6) that the amendment to Section 241(a)(1) of the Immigration and Nationality Act of 1956 is or amounts to an *ex post facto* law applied retroactively to appellant who should therefore be relieved from its burdens. Like his constitutionality and "savings clause of immunity from deportation despite Section 241(d)" arguments, this argument is raised for the first time on appeal, without a shred of support in the record. Again, from an abundance of caution, appellee will answer this unsupported and unargued assertion of appellant without waiving his insistence that this Court should rule the question moot for failure to raise it below.

Appellant states, "It is true that retroactive and *ex post facto* laws have been held by the Supreme Court not to be applicable to immigration and nationality laws." (App. Br. p. 5.) Appellee assumes that appellant refers to such

cases as *Harisiades v. Shaughnessy,* 342 U. S. 580, 594 (1951), and *United States v. Sahli,* 216 F. 2d 33, 40-41 (C. A. 7, 1954), which hold that such laws are neither retroactive nor *ex post facto.* Hence, appellee is unable to understand appellant's unsupported assertion that "There is no question but that the law could not be made retroactive and hence *ex post facto* with respect to the crimes and criminal procedures, and hence could not be separated to be made *ex post facto* with respect to deportation." (App. Br. p. 5.)

Apparently, appellant also complains that Section 241(a)(11), as amended, cannot apply to him because it ". . . was not expressly made retroactive. . . ." (App. Br. p. 6.) However, this assertion ignores the explicit wording of Section 241(a)(11), as amended, that one ". . . who *at any time* has been convicted of a violation of . . . any law . . . relating to the illicit possession of . . . narcotic drugs. . . ." (Emphasis ours.) This assertion also ignores the provision of Section 241(d) in that aliens deportable under Section 241(a) shall not be exempt from deportation by virtue of ". . . (2) . . . facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of the Section (viz. 241(a)) occurred prior to June 27, 1952." If appellant is not immune from deportation for acts occurring prior to June 27, 1952, it is difficult to see why he is immune for a deportable act occurring on July 29, 1953.

Appellant has cited the case of *Del Guercio v. Gabot,* 161 F. 2d 559 (C. A. 9, 1947) (App. Br. p. 6), for the proposition that application of legislation with an *ex post facto* flavor should not be condoned. Appellant quotes the

following extract from that case in support of his proposition:

> ". . . The law does not favor the retroactive application of statutes. *Ex post facto* application of criminal law is prohibited by the United States Constitution. Of course, the issue here is not concerned with the subject of *ex post facto* law, yet it approaches it in principle, for if the Director is right, the appellee is to be forceably deported only by the retrospective application of a law which has constituted a perfectly legal act, when done, a necessary element for the deportation."
>
> *Del Guercio v. Gabot,* op. cit. at p. 561.

However, the quotation from the *Gabot* case is inapplicable to the instant case in many respects. First of all, the quotation is *obiter dicta.* It was not necessary to the actual holding of the *Gabot* case, namely, that *Gabot* was not an alien so that his otherwise deportable act did not apply (at p. 561). Secondly, the "perfectly legal act," which the *Gabot* act refers to, was not a deportable act but a 1934 reentry into the United States after a four-hour sojourn in Mexico. That act, the Government argued unavailingly, made *Gabot* in legal contemplation an alien. In the instant case, appellant has been an alien since July 4, 1946, well before his deportable conviction in 1953 arose.

Hence, it is submitted that appellant has been ordered deported under a law that is neither *ex post facto* nor made retroactive without the express consent of Congress.

## Conclusion.

In conclusion, appellee respectfully submits to this Honorable Court:

(1) That the points appellant has raised on this appeal were not raised below and hence he has waived any right to have them reviewed here.

(2) That in any event the points raised amount to ambiguous assertions, without any authority to support them.

(3) That all of appellant's points are without any merit whatsoever; and hence, for all or any of these reasons, the judgment appealed from below should be affirmed.

Respectfully submitted,

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